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In the Supreme Court of the United States

OCTOBER TERM 1993

ANDREW V. RESTIVO, II,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Confrontation Clause of the Sixth Amendment violated when a defendant is prohibited from going beyond the written particulars of a government-drafted plea agreement in cross-examining a witness concerning his motivations for, and expectations from, the plea agreement; and, in particular, is prohibited from exposing the witness' perception that his cooperation will cause the government not to prosecute his children for their involvement in his crimes; is prohibited from eliciting the witness' knowledge that, by his plea, he has reduced his sentencing exposure by tens of years; and is prohibited from exploring the witness' awareness that the government's sentencing assistance may be governed by its satisfaction with the substance of his testimony?

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion affirming petitioner's conviction on November 22, 1993. The Fifth Circuit's opinion is reported at 8 F.3d 274 (Appendix A). Panel rehearing and a suggestion for rehearing en banc were both denied on December 27, 1993, and this also is reported at 8 F.3d 274 (Appendix B).

JURISDICTION

Jurisdiction to review by certiorari the decision of a federal court of appeals

in a criminal case is established in Section 1254(a) of Title 28, United States Code.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him;....

SENTENCING GUIDELINES SECTION 5K1.1

Section 5K1.1 of the United States Sentencing Guidelines provides in pertinent part:

> §5K1.1. Substantial Assistance to Authorities
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.***

STATEMENT OF THE CASE

This case involves the cross-examination for bias of a government witness who had entered into a written plea agreement.

The Fifth Circuit held that a denial of cross-examination as to the expectations and motivations arising from the plea agreement causes no Confrontation Clause violation so long as the government informed the jury of the written particulars of the plea agreement. This holding brings the Fifth Circuit into direct conflict with other courts of appeals. It presents an evasion of this Court's command in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), that denials of confrontation for bias be recognized as constitutional error, subject only to harmless error review. As a consequence, it signals to the trial courts of the Fifth Circuit a trivialization of the defendant's constitutional right to confront the witnesses against him and thereby to expose the biasing motivations of the witness. Certiorari is appropriate to remedy this serious erosion of the right of confrontation and its truth-seeking function.

A. Course of proceedings and disposition below.

A grand jury in the Eastern District of Louisiana indicted petitioner Andrew V. Restivo, II for various offenses arising during and in connection with his tenure as president of the Schwegmann Bank & Trust Company, a New Orleans area bank. The charges included counts alleging conspiracy, bank fraud, misapplication by a bank officer, money laundering, false entries in bank documents, and false declarations before a grand jury investigating those offenses.

The jury convicted Restivo on 11 of the 12 counts charged. The district court sentenced him to a prison term of 100 months followed by three years supervised release.

B. Statement of the facts.

This case involved three principal actors: petitioner Restivo, and government witnesses Jerry Delchamps and Lloyd Hoffman. Restivo, in his mid-30's, was the president

of a small New Orleans area bank, the Schwegmann Bank & Trust Company. Jerry Delchamps ran Dixie Lloyds, a 10/20/10 automobile liability insurer, and related companies, one of which arranged premium financing at the Schwegmann Bank for low-income automobile owners. Delchamps was a borrower from, and maintained his insurance and premium finance company operating accounts at, the Schwegmann Bank. Lloyd Hoffman was Delchamps' loan officer at the Schwegmann Bank.

The banking and related crimes were of two sorts. First, Delchamps was the recipient of three large loans from the Schwegmann Bank which were not board-approved, although required to be so because each exceeded $250,000. Second, Delchamps kited funds between his accounts at the Schwegmann Bank and his accounts at another New Orleans area bank, the Bank of Louisiana; as a result of his bogus cross-deposits, the kited loss

between the two banks amounted to close to $2 million.

It was by corrupting Hoffman that Delchamps got Hoffman to help procure the board-unauthorized loans. Delchamps enticed Hoffman secretly to invest $6,000 in a Delchamps company, and obligated Hoffman further in the venture by a $150,000 note Hoffman signed in Delchamps' favor. Neither Restivo, nor the Schwegmann Bank Board, nor anyone else at the Schwegmann Bank knew of Hoffman's compromised and divided loyalties.

Delchamps was able to begin and continue the check kite between his accounts at the Schwegmann Bank and at the Bank of Louisiana by corrupting officers of the Bank of Louisiana. When these officers discovered that Delchamps was writing checks from his Bank of Louisiana accounts against insufficient funds, Delchamps bribed them with free insurance to permit him to continue the practice. Because of the uncertain-

ties of Delchamps' financial condition, Restivo instructed Schwegmann Bank officials to verify daily over the telephone with the Bank of Louisiana that there were sufficient funds at the Bank of Louisiana to cover Delchamps' deposits of Bank of Louisiana checks. The corrupt Bank of Louisiana officials falsely verified each day that the Bank of Louisiana checks were good. Delchamps did not share knowledge of his check kiting scheme with anyone at the Schwegmann Bank, not even his corrupted loan officer, Hoffman.

The government did not allege, and there was no evidence, that Delchamps paid off Restivo, or in any other way financially benefitted Restivo, in order to obtain the loans from the Schwegmann Bank without board approval or to permit the check kite to continue. The government's theory of benefit was that this young bank president wanted his young bank to prosper, and there-

fore he wanted a major customer, Delchamps, to stay afloat.

Restivo testified. He denied any knowing and intentional participation in Delchamps' obtaining loans that Restivo believed to be unauthorized,[1] and he denied any knowing or intentional assistance or allowance of the check kite.

The government's principal witnesses against Restivo were Delchamps and Hoffman. To convict Restivo on the allegations of wrongdoing involving the check kite, the jury had to believe Delchamps over Restivo. To convict Restivo on the allegations of wrongdoing involving the board-unauthorized loans, the jury had to believe Delchamps and Hoffman over Restivo.

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[1]There were three such loans. Restivo testified that he did not participate in arranging the first two loans at all, and believed that he had continuing authorization for the third loan which he did arrange.

C. The attempted cross-examination of Delchamps for bias.

Both Delchamps and Hoffman had pled guilty by the time of Restivo's trial. They did so under agreements to testify against Restivo in exchange for significantly reduced charges carrying greatly reduced maximum penalties. In both cases, the government confected written plea bargain letters. Delchamps' letter said he had pled to two five year counts, Hoffman's, that he had pled to one five year count. In these letters, the government noted the availability of a substantial assistance motion under Section 5K1.1 of the United States Sentencing Guidelines to enable the defendant to receive a sentence below guidelines, but asserted that no promise was made, and that the government retained unfettered discretion to make the motion or not.[2] The plea

[2]After Restivo's trial, the government filed Section 5K1.1 motions for both Delchamps and Hoffman thereby enabling an 18

letters also state that the defendant "agrees" that he will "be completely truthful," and they repeat several times the defendant's obligation, under his part of the bargain, to tell the truth.[3]

The government called Delchamps to the witness stand before Hoffman. As a trial stratagem, it fronted Delchamps' plea bargain during his direct examination, but elicited only limited information about the plea bargain.

The government had Delchamps admit the two count plea, but not that the plea bargain thereby limited his sentencing exposure to 10 years. Asked to state his understanding of the plea agreement, Delchamps testified that he was to tell the truth. He further stated his belief that if he told

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month sentence for Delchamps and probation for Hoffman.

[3]The Delchamps plea letter is reprinted in Appendix E.

the truth, the government "*would* write a letter for me... to the Judge and ask for a lighter sentence." The government let pass without comment or correction this apparent contradiction to the unfettered discretion purportedly reserved to the government in the plea letter, and asked Delchamps no questions about the Section 5K1.1 motion. The government thereafter introduced the plea letter. Delchamps stated that there were no other agreements and no promises.[4]

On cross-examination, defense counsel intended to confront Delchamps on unstated consequences of his plea bargain, on the meaning and impact of certain of the written terms of the government-drafted plea letter, and on certain of Delchamps' statements on the direct examination. The combination of

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[4]The government's direct examination of Delchamps on his plea bargain is reprinted in Appendix C; the cross-examination of Delchamps on the plea bargain is reprinted in Appendix D.

government objections and court rulings, however, defeated these objectives. By the conclusion of the cross-examination of Delchamps on his plea bargain, the jury had heard little more than what the government had already presented on its direct examination.

Defense counsel first attempted to explore the limits on sentencing exposure Delchamps had achieved by agreeing to testify against Restivo. The court, however, ***completely*** prohibited cross-examination on ***any*** aspect of sentencing, including sentencing exposure, i.e., the "cap" achieved by negotiating the plea to the two five-year counts. All the defense was permitted to elicit from Delchamps was that he knew that, but for the plea bargain, he could also have been charged with money laundering, but because of the prohibition on questions about sentence, the jury never learned the additional fact that alone gives consequence

to the disclosure: that a single count of money laundering carries the potential for an additional 20 year sentence.[5]

Defense counsel next turned to Delchamps' Section 5K1.1 expectations. The court again permitted the government's version from its direct examination to go to the jury untested by meaningful cross-examination. To the suggestion that he would get the coveted Section 5K1.1 letter only if the government thought he *earned* it, Delchamps reiterated his statement on direct, that he *would* get it if he told the truth. When defense counsel pressed Delchamps to concede that the government would at least have to buy his testimony *as* the truth, the government objected that cross-examination on the

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[5]The government conceded in its brief in the Fifth Circuit that Restivo had the right to cross-examine Delchamps on his potential sentence, and that the government's objection -- which provoked the court's denial of cross-examination on the subject -- was erroneous.

subject should be limited to the plea bargain letter itself. Immediately thereafter, the court intervened, led Delchamps to agree that the plea letter was his understanding of the agreement, and cut off all further cross-examination on how Delchamps might be motivated or biased by his understanding of and his desire for the motion for sentencing departure.[6]

In the last effort to reveal Delchamps' motivation to help the government convict Restivo, defense counsel turned to benefits Delchamps might expect or hope from the government that were *not* expressed in the plea letter. Cross-examination on a plea agreement perforce means not only testing the assertions of the witness about it but also questioning both what was included and what was excluded. Delchamps testified on

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[6] THE COURT: And that document is in evidence. The jury can review it.

his direct examination by the government that there were no other promises or agreements besides the plea letter; he did not testify that he was without hope or expectation of additional benefits.

Counsel began this cross-examination by getting Delchamps to acknowledge that his daughter and son-in-law worked for Dixie Lloyds, wrote many of its checks, and were integrally involved in overpayments that caused cash flow problems, and, he was about to admit, had purchased their home with insurance company funds. Counsel intended to show that Delchamps could reasonably have believed that his daughter and son-in-law were vulnerable to prosecution, and that by pleading guilty and agreeing to testify against Restivo, he was protecting them from prosecution. As counsel pointed out to the court:

> [t]hey had an interest and participated... [T]hey did as much as anybody did. They're not

> charged. They're not named as targets or subjects.

The government argued that there was no such promise in the written plea letter it had drafted,[7] and that the cross-examination went "beyond the scope" of the government's "direct examination." The court accepted the government's arguments that the cross-examination was bound to the government-drafted plea letter, and shut the cross-examination down. "Stay off this." The case went to the jury without Delchamps ever having been confronted with this motive to lie or exaggerate, a motive from which the jury could have understood that he had powerful reason to give the government what he believed the government wanted in order

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[7]It is not in the plea agreement. Show me the plea agreement where it says I will not charge his daughter or son-in-law. Show me where it says that.

to protect his family from the possibility of prosecution.[8]

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's decision in this case conflicts with decisions in the Eighth, Ninth and Eleventh Circuits.

1. The Fifth Circuit's conflict with the Eleventh Circuit.

The Fifth Circuit did not dispute that Restivo was prevented from cross-examining Delchamps on "(3) whether Delchamps pled guilty to spare his daughter and son-in-law

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[8]Hoffman also made a plea bargain and signed a government-drafted plea letter similar to Delchamps'. But unlike Delchamps, Hoffman was shown to be biased from sources besides the plea bargain. Restivo had fired him from the bank, and Hoffman resented it; his animus towards Restivo is patent even on the cold record. Moreover, after Restivo fired him, Hoffman went to work for Delchamps and a jury might thereby have inferred a testimonial alliance between the two government witnesses. Because of the government objections and court rulings during the just completed cross-examination of Delchamps, however, Restivo's counsel chose not engage in the apparently futile exercise of cross-examining Hoffman on his plea bargain and thereby not repeat the debacle of the Delchamps cross-examination.

from prosecution." 8 F.3d at 278. Instead, the court listed other facts the jury learned about Delchamps from which the jury could draw inferences of his bias to give favorable testimony for the government. "Restivo's counsel,"[9] said the court, "was permitted to expose" these facts:

> that Delchamps entered into a plea agreement with the government; that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement;[10] and that the issuance of the Section 5K1.1 letter for sentencing

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[9]This is a mischaracterization of the record. It was the government on its direct examination, not Restivo's counsel in exercising the right to confront and cross-examine, that "exposed" the most significant of the listed facts to the jury. See the footnotes immediately following.

[10]In fact, the jury never learned that money laundering was a "more serious offense" because the court prohibited questions on the higher sentence for and seriousness of that offense.

> purposes was within the discretion of the government.[11]
>
> *Id.*

The court concluded that there was no Sixth Amendment violation because, "[b]ased on ***these facts***, the jury could have inferred that Delchamps was a biased witness." *Id.*

The three listed facts, however, were all facets of but one source of bias that might motivate a witness to give falsely helpful testimony for the government. That source of bias was the self-interest of the witness in minimizing his time in jail. Delchamps wanted the lowest sentence he could get, and he both wanted and needed the government's help to get it.

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[11]The government, not Restivo's counsel, introduced the plea bargain letter that said that the Section 5K1.1 letter was within the sole discretion of the government. Delchamps contradicted this "fact," stating twice that he ***would*** get the Section 5K1.1 letter if he told the truth. The jury never learned, however, what "truth" Delchamps was speaking about.

But there was a second distinct source of bias, one not involving Delchamps' self-interest in achieving the lowest possible sentence. Delchamps could reasonably have believed that his daughter and son-in-law were vulnerable to prosecution for their roles in suspect aspects of his insurance business. He would want to protect them, if he could, from prosecution. And he could reasonably expect that, if he played on the government's side and helped the government in its effort to win, the government would not go after his family. Under these circumstances, it was appropriate to pose the question, "Would a father lie to keep his daughter out of the penitentiary?" The jury never learned the facts which would have forced it to confront this question and only then judge whether Delchamps might be falsely implicating Restivo in his own misdeeds in order to save his daughter and her husband from prison.

In overruling Restivo's claim under the Confrontation Clause, the Fifth Circuit somehow conceptualized bias as a uniform state which, once demonstrated in *any* way from *any* source, requires no further proof, no matter how compelling another source of bias might be. The court rejected the proposition argued, that the Sixth Amendment was violated because the witness' very distinct and independently powerful motivation to lie or exaggerate against Restivo was kept from the jury.[12]

The Eleventh Circuit has ruled to the contrary. *United States v. Lankford*, 955 F.2d 1545 (11th Cir. 1992), holds that,

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[14]Compare what Justice Jackson observed for a unanimous Court in *Gordon v. United States*, 344 U.S. 414, 423 (1953), about a judge's latitude to reasonably control cross-examination:

> But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.

under the Confrontation Clause, the defendant is entitled to expose facts, brought out in cross-examination, that support each of several distinct sources of possible bias or motivation to fabricate in the government's favor.

In *Lankford*, the principal government witness was impeached by proof that he had demanded use immunity before he would testify for the government. *Id.* at 1549, n.9. The jury thereby learned that the witness had benefitted personally by agreeing to testify for the government; he had one source of bias: self-interest in avoiding a possible indictment based on admissions of criminal wrongdoing. In a totally unrelated incident, the witness' sons had been arrested on state charges for the sale of 20 pounds of marijuana. There had been no explicit deal for the sons with the federal authorities. When defense counsel attempted to prove the sons' arrest and how that might

have motivated the witness to want to help the government, the trial court refused to permit the impeachment. The Eleventh Circuit reversed, holding that the fact of the sons' state prosecution could not be kept from the jury under the Sixth Amendment:

> Notwithstanding the fact that LeCroy [the prosecution witness] had made no deal with the government concerning a federal investigation into his sons' marijuana arrests, his desire to cooperate may have in fact been motivated by an effort to prevent such an investigation. ***We cannot imagine a much stronger motive for testifying on behalf of the government than the desire to protect one's children.*** A reasonable juror could have concluded that LeCroy's testimony was the result of his desire to protect his sons and to obtain federal assistance in avoiding a subsequent federal prosecution against them. In addition, a reasonable juror could conclude that LeCroy might even have hoped that should things go "well" for the government in the Lankford case, he could later solicit help from the federal government in his sons' state case.
>
> *Id.* at 1549 (emphasis supplied).

Lankford therefore holds that personal benefits to a government witness involving his freedom on the one hand and protection of the witness' family from criminal penalties on the other are distinct biasing motivations for Sixth Amendment purposes. The Confrontation Clause of the Sixth Amendment was violated because this distinct and independently powerful motivation to lie or exaggerate against the defendant was kept from the jury.[13]

The Fifth Circuit and Eleventh Circuit cases are in direct conflict. The question -- impeachment of a government witness who receives personal benefits but who may also

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[13]Restivo's case was much more compelling on this score than was Lankford's. Delchamps' children were more directly vulnerable to a federal prosecution than were the witness' sons in *Lankford*. The source of vulnerability in Restivo's case arose out of the very same conduct that resulted in Delchamps' plea and testimony. And the prosecutor responsible for Delchamps' indictment directly controlled the fate of Delchamps' children.

have an equally strong or stronger motivation to protect family from prosecution -- is likely to recur. It involves a "prototypical form of bias on the part of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). It is, indeed, a special case of the broader question: whether allowance of impeachment for one prototypical form of bias makes immaterial under the Confrontation Clause proof of a second prototypical form of bias, distinct from the first, and independently motivating.[14]

2. The Fifth Circuit's conflict with the Eighth Circuit.

The Fifth Circuit acknowledged that Restivo was prevented from cross-examining Delchamps on "(1) whether a 'cap' existed on Delchamps' sentence as a result of his plea agreement." 8 F.3d at 278. It is undisput-

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[14]Petitioner notes that he cited and relied on *Lankford* in his original brief to the Fifth Circuit, yet the court failed even to mention *Lankford* in its opinion.

ed that the plea bargain created an absolute cap of 10 years on any sentence Delchamps could receive. But in fact, the limitation on cross-examination was broader than that. The government successfully objected that sentencing was "not [a] proper topic for the jury," thus preventing all exploration of Delchamps' received and hoped for benefits for testifying helpfully against Restivo. The Fifth Circuit, in upholding this ruling, therefore held that the specific sentencing goals the accomplice witness had achieved and still hoped to achieve by his plea bargain and testimony could be kept from the jury. The jury's knowledge of the mere existence of a plea agreement to lesser charges and of the discretionary Section 5K1.1 letter were all the biasing facts the Confrontation Clause required.

This decision cannot sit side by side with the Eighth Circuit's decision in *United States v. Roan Eagle*, 867 F.2d 436 (8th

Cir.), *cert. denied sub nom. Roan Eagle v. United States*, 490 U.S. 1028 (1989). In that murder prosecution, the government witness was a former co-defendant who had been given a plea bargain to manslaughter, thereby reducing her sentencing exposure from life in prison to 10 years. The jury learned that the witness pled to a lesser charge, but not what that plea meant for her hopes for freedom. The trial court prohibited cross-examination of the witness that would have exposed this strongly biasing motivation, but the Eighth Circuit ruled that this foreclosure violated the defendant's Sixth Amendment right to confrontation.

> When the stakes are so high and the credibility of the one-time associate-in-crime is acutely involved, the accused is entitled as a matter of right to effective cross-examination. This includes not only the specific crime to which the co-actor is pleading guilty, but the range of punishment to which the one pleading guilty is exposed to in contrast

> to what that person knows -- or ought to know -- is the potential sentence for a conviction following a plea of not guilty.
>
> * * *
>
> To save herself from years up to life, she could plead guilty and assure a maximum of ten years. What greater inducement or incentive could there be for one confronted with that prospect to eliminate all doubts and risks by a plea of guilty to a known lesser offense so that such person could carry out the plea agreement to testify affirmatively against the former co-defendant.

Id. at 443.[15]

Thus, the Fifth and Eighth Circuits are at loggerheads over the meaning of the right to confront and cross-examine for bias an alleged "one-time associate-in-crime" who becomes a government witness and saves or hopes to save years behind bars if he does the government's bidding. In the Eighth

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[15]It turned out that the plea-bargained government witness in *Roan Eagle* did not give any harmful testimony. Thus, the credibility of the witness was not in issue and the court affirmed the conviction.

Circuit, such a witness as of right "would be subject to the most vigorous attack on credibility" based on the sentence received for testifying for the government. *Id.* at 443. In the Fifth Circuit, if from any facts "the jury could have inferred that [the witness] was a biased witness," 8 F.3d at 278, no cross-examination, let alone vigorous cross-examination, need be afforded on the years of freedom achieved or anticipated. The difference in the credibility testing process required in these two circuits, both operating under the command of the same Sixth Amendment, could not be starker.

3. The Fifth Circuit's conflict with the Ninth Circuit.

The written plea bargain stated:

- The defendant understands that he must be completely ***truthful***.
- The defendant also agrees to appear before the Grand Jury or trial Jury and to testify ***truthfully***.

> - The defendant agrees that if he is not *truthful*, this agreement will be null and void and the defendant may be prosecuted for perjury or making false statements.[16]

The Fifth Circuit acknowledged that Restivo was prevented from cross-examining Delchamps on "(2) whether the government had to agree that Delchamps was telling the truth before it filed a substantial assistance letter on his behalf." 8 F.3d at 278. On direct examination, Delchamps testified that he would get the Section 5K1.1 letter if he told the truth, but that he would violate the plea agreement "[i]f I would lie and wouldn't tell the truth."

When Restivo's counsel, on cross-examination, attempted to probe Delchamps' belief of what "telling the truth" in connection with his plea bargain meant to him -- was it

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[16]The plea letter also stated, "The defendant agrees neither to implicate anyone falsely nor to exculpate or protect anyone falsely."

the government buying and accepting his story implicating Restivo, one that he had already successfully sold? -- the district court shut down the examination by referring the jury to the plea bargain letter.

> THE COURT: Is your understanding of the plea agreement what was represented by the document that you signed?
>
> THE WITNESS: Yes, ma'am.
>
> THE COURT: And that document is in evidence. The jury can review it.

For all intents and purposes, then, the district court ruled that the plea bargain letter was the best evidence of Delchamps' beliefs and motivations about his deal. The witness' conception of the "truth" in his plea agreement and who would judge it and how and in what way that might affect his testimony could be kept from the jury; the meaning of truth for Delchamps was besides the constitutional point of the Sixth Amendment. The jury's knowledge of simply the

existence of a plea agreement to lesser charges and of the discretionary Section 5K1.1 letter were all the biasing facts the Confrontation Clause required.

In *United States v. Mayans*, ___ F.3d ___, 1994 U.S. App. LEXIS 2013 (No. 92-50530)(9th Cir. 2/9/94), three alleged buyers of drugs from the defendant testified against him. Their written plea bargains were presented to the jury and the jury could therefore read the written terms of the agreements. The Ninth Circuit opinion does not detail the plea bargains, but presumably the witnesses pled guilty to lesser or fewer charges and were subject to and motivated by the government's power to give or withhold the Section 5K1.1 letter (or the parallel, post-sentence Rule 35 (b) motion). When defense counsel attempted to probe the witnesses' understanding of specific provisions of their plea agreements, however, the trial court cut off question-

ing, essentially holding the plea agreements, rather than what was inside and motivating the witnesses' minds, to be the best evidence of the witnesses' understanding of the agreements. The Ninth Circuit reversed.

> But the understanding of all three of the witnesses clearly was relevant, and the district court erred by cutting off defense counsel's cross-examination on the grounds that it was not.

The Fifth and Ninth Circuit decisions conflict. In the Fifth Circuit, disclosing the fact of a plea bargain, the fact that the plea was to lesser charges, and the fact that the government has discretion to file a Section 5K1.1 letter or not, is all the confrontation to which the Sixth Amendment entitles a defendant. In the Ninth Circuit, the written plea agreement is the starting point of the cross-examination, not its end point. What is relevant in the Ninth Circuit is what the witness understands (be-

lieves, hopes),[17] not simply and only what the government has written up to be viewed by the jury.[18]

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[17]*Cf. Gordon v. United States*, 344 U.S. 414, 422 (1953).

> But the question for the jury is ***what effect they think these words had on the mind and conduct of a prisoner whose plea of guilty put him in large measure in the hands of the speaker.*** They might have regarded it as an incentive to involve others, and to supply a motive to [the witness'] testimony other than a duty to recount the facts as best he could remember them.

[18]The Fifth Circuit is also in apparent conflict with the First Circuit. In *United States v. Lynn*, 856 F.2d 430 (1st Cir. 1988), the government-drafted plea bargain included a clause requiring the witness to pass a polygraph examination. However, defense counsel was barred from cross-examining the witness on some "inconclusive" responses in the polygraph examination. The written plea agreement went to the jury. The First Circuit reversed because defense counsel was not permitted to test the witness on this part of his written plea bargain.

> This particular area of Bryon's potential bias had not yet been fully explored by the defense. While the cross-examination of Bryon was extensive, there were

4. Summary of the conflicts.

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court instructed courts considering a claimed Confrontation Clause violation to focus on the witness, and then determine if "cross-examination designed to show a prototypical form of bias" of the witness had been foreclosed at trial, thereby preventing a reasonable jury from receiving "a significantly different impression of [the witness'] credibility." *Id.* at 680. The motivation to protect family from prosecution by testifying favorably for the

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relatively few questions concerning Byron's continuing reasons to lie to please the government. Defense counsel elicited the details of Bryon's many drug smuggling operations and of his dealings with his associates in crime, but cross-examination on the foreclosed topic may have presented the only concrete example ***of the hold the government might still have had over the witness.***

Id. at 433.

prosecution is a prototypical form of bias; so is saving oneself years in jail; and so is what you feel and believe you have to say to get the government to help you and prevent the government from hurting you. Cross-examination on these prototypical forms of bias was foreclosed by the district court, but the Fifth Circuit chose not to follow *Van Arsdall's* instructions. The Fifth Circuit thereby created conflicts with the Eighth, Ninth and Eleventh Circuits, all of which heeded *Van Arsdall's* instructions, conflicts which the Court should resolve by granting certiorari.

B. The Fifth Circuit's decision flouts this Court's instructions, as set forth in *Delaware v. Van Arsdall*, on how to evaluate Confrontation Clause claims where cross-examination for bias has been curtailed.

In *Delaware v. Van Arsdall*, *supra*, the witness to the homicide was impeached by proof that he had been very drunk. The trial court refused to permit further im-

peachment of the witness on the separate fact that a minor public drunkenness charge had been dropped after he agreed to speak with the prosecutor. The Court found a violation of the Confrontation Clause because the defendant had been denied even the opportunity for cross-examining the witness on this separate issue potentially affecting his credibility:

> [T]he trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.
>
> *Id.* at 679 (emphasis as in original).

Here, the trial court limited cross-examination to the government-drafted plea letter and prohibited *all* inquiry into the possi-

bility that Delchamps was biased from a motivation to protect his daughter and son-in-law from the possibility of prosecution.[19] As in *Van Arsdall*, the fact that

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[19]Government counsel never once contradicted defense counsel's assertions about the children.

> They had an interest and participated... [T]hey did as much as anybody did. They're not charged. They're not named as targets or subjects.

And the preliminary questions of defense counsel revealing the involvement of Delchamps' children in questionable aspects of his insurance business gave more than ample reason to believe that the cross-examination would be successful -- whether Delchamps admitted that he was so motivated or not. But there is no requirement that the cross-examiner be able to demonstrate in advance that he will succeed.

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.
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> *Alford v. United States*, 282 U.S. 687, 692 (1931).

the jury learned of other impeaching facts could not justify a total bar of the opportunity for cross-examination on this distinct source of potential bias.

Under *Van Arsdall*, the Fifth Circuit was required to determine whether "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680. That is because the Confrontation Clause demands the opportunity for effective confrontation of ***the witness.***

> [T]he focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.
>
> *Id.* at 680.

The Fifth Circuit should therefore have focused on Delchamps to judge whether or not

the jury, hearing that Delchamps might believe he was protecting his family by testifying for the government, could get a significantly different impression of him than it got from his distinct and self-centered interest in keeping his sentence low.

The potentially biasing fact in *Van Arsdall* was the prosecutor's dismissal of a minor public drunkenness charge. The Court concluded that if the jury had known of this fact, its impression of the witness would have been significantly different. Restivo's case that the Confrontation Clause was violated is inherently more persuasive. The powerful motive to lie to protect a child from a felony prosecution can hardly be compared to the temptation to lie to get out of a misdemeanor charge of public drunk-

enness.[20] If the Fifth Circuit had abided by *Van Arsdall's* rules, it could not have avoided finding a violation of the Confrontation Clause.

The Fifth Circuit violated *Van Arsdall's* rules, and it did so flagrantly. It itemized the foreclosed lines of cross-examination. But it refused to determine if any one of those lines (or all of them together) could have given the jury a significantly different view of Delchamps' credibility. It made no judgment on whether the district court had erroneously prohibit-

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[20] *See also Davis v. Alaska*, 415 U.S. 308 (1974). There, the state's witness admitted that it "came across [his] mind" that "the police might somehow think that [he] had something to do with" the burglary, *id.* at 313, a demonstration of some potential for bias. But that did not satisfy the Sixth Amendment's demand that the jury *also* know that the witness was on juvenile probation for burglary, because from that fact, the jury could have inferred more concretely that the witness felt vulnerable to police pressure and that he might be considered a suspect if he did not lay off suspicion on someone else. *Id.* at 318.

ed proper questions. It gave no guida to district courts in the Fifth Circuit on what cross-examination the Confrontation Clause requires. Instead it jumped to other facts. From these other facts, it said, the jury might have inferred that Delchamps was a biased witness. It concluded that there was no Sixth Amendment violation without ever having decided whether Restivo was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Van Arsdall*, 475 U.S. at 680.

What the Fifth Circuit did is precisely what *Van Arsdall* prohibits. The Fifth Circuit engaged in a kind of outcome-determinative analysis for Confrontation Clause claims that the Court explicitly rejected.[21] Without judging whether there had been a denial of confrontation, it concluded

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[21]See 475 U.S. at 679-80; 684-86 (concurring opinion of Justice White).

that there could be no error because "the jury could have inferred that Delchamps was a biased witness." 8 F.3d at 278. By doing so, it not only avoided honoring Confrontation Clause values. By failing to acknowledge that proper lines of cross-examination were foreclosed, it avoided even the fair and diligent scrutiny that constitutional harmless error analysis demands.[22]

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[22]If the Fifth Circuit had conducted a fair and diligent analysis for harmless error, it would have had to acknowledge Delchamps' importance to the government's case. On the check kite and money laundering counts, it was only Delchamps' word that Restivo had to know laid against Restivo's denials. Delchamps testified that he never told Restivo explicitly that he was kiting checks. There simply was no direct evidence of Restivo's knowledge and intent. Absent Delchamps' testimony, none of the government's purported corroborating evidence was sufficient to support a conviction.

On the counts involving the loans, Delchamps was aligned with Hoffman against Restivo. However, there was little else to corroborate their word that Restivo had knowingly and intentionally participated in issuing loans that he believed required board approval. If Delchamps had been successfully impeached and discredited, the jury would have had to choose, one on one, between

Van Arsdall imposed a regime of honesty in analyzing allegations that proper cross-examination was foreclosed. And for good reason. The Confrontation Clause promotes accuracy in fact finding. Violations of the Confrontation Clause should therefore be discouraged because they lead to inaccuracy in fact finding. Such violations should not

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Restivo and Hoffman. At trial, Hoffman displayed an animus towards Restivo deriving from Restivo's firing him, thus revealing his bias against Restivo. But for the improper decimation of the cross-examination on Delchamps' plea bargain, there would have been a substantial basis for attacking Hoffman on *his* plea bargain. Indeed, as a result of the deficient, counter-productive cross-examination of Delchamps, Hoffman's credibility as a plea-bargained witness was bolstered. Even without such an impeachment, on Count 4, where Hoffman and Delchamps testified that Restivo was party to one of the three loans but where the documents did not support Restivo's involvement, the jury acquitted.

Thus, if Delchamps had been successfully impeached, the outcome of the trial might well have been different. On a fair and diligent analysis for harmless error, a court would have had major difficulty finding the denial of confrontation harmless beyond a reasonable doubt.

occur in the first place and, subject to harmless error analysis which serves other interests, such violations should be identified forthrightly when they occur and disapproved so that lower courts will be deterred from repeating the errors.[23]

Decisions, like the Fifth Circuit's in petitioner's case, erode these constitution-

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[23]If --

> [n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses[,]
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> *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987);

and if the right to confrontation is --

> designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination,
>
> *id.*

then wide latitude is to be encouraged by the appellate courts and improper restrictions on cross-examination should be disapproved.

al values. By failing to acknowledge proper cross-examination that has been foreclosed, the court of appeals sends the wrong signal to district courts under the court's tutelage. Government-drafted plea bargains and Section 5K1.1 inducements are daily grist for cross-examination in criminal trials in every federal district court. It is wrong, by opinions such as this, to encourage district courts to tell juries to accept the government's version of the plea agreement and to tell counsel to move on from there. By disregarding *Van Arsdall*'s injunctions, the Fifth Circuit has disserved the Confrontation Clause.

The Court should grant certiorari to preserve, invigorate, and enforce the principles on which *Van Arsdall* is based.

C. The Fifth Circuit overrode the core value of the Sixth Amendment: confrontation *by the defendant*.

The Fifth Circuit concluded that there was enough information from which "the jury could have inferred that Delchamps was a biased witness." It based its conclusion on the following facts:

> [a] that Delchamps entered into a plea agreement with the government; [b] that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement; and [c] that the issuance of the §5K1.1 letter for sentencing purposes was within the discretion of the government.

The court then states that "Restivo's counsel was permitted to expose" these facts to the jury.

Except for one aspect of [b], however, these facts were *not* "exposed" to the jury *on cross-examination* by Restivo's counsel; they were elicited by the government. It was the government *on its direct examination* that introduced to the jury the plea bargain

and the government's formulation of how Delchamps could get the Section 5K1.1 letter.[24]

It is surely apparent that the government did not intend that, upon its eliciting these facts, the jury would find Delchamps biased, turn away from him and discount his testimony. To the contrary, the government brought out these facts in order to advance its case; to preempt and blunt defendant's attack on Delchamps' credibility; and to minimize any alleged biasing impact of the plea bargain.

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[24]As to the second of the facts, [b], it is true that it was Restivo's counsel who exposed for the first time on cross-examination Delchamps' knowledge that he could have been charged with money laundering if not for his plea agreement. But it is not true that the jury learned, from the defense or from anyone, that money laundering was a "more serious" charge, because the court barred Restivo's counsel from exposing anything about sentences and sentence exposure. The money laundering information came to the jury devoid of its significance for Delchamps' sentencing prospects.

On cross-examination, however, the court barred Restivo's counsel from probing these matters significantly beyond the terms of the government-drafted plea letter. Instead of hearing what the plea bargain truly meant to someone motivated to stay in the government's good graces; instead of learning about the power of that arrangement to tempt a witness to exaggerate or lie; instead of understanding that the witness might have hopes and expectations to protect his family, although not promised in the plea letter; the jury learned nothing but the trivialization of the distorting effect of the plea bargain that the government wanted it to hear.

The Sixth Amendment is a *defendant's* right. "In all criminal prosecutions, *the accused* shall enjoy the right... to be confronted with the witnesses against him." The defendant's right under the Sixth Amendment is an adversarial right that serves an

adversarial value and it cannot be satisfied by *the government's* elicitation of facts any more than *ex parte* affidavits or depositions could satisfy that core Sixth Amendment value. *Mattox v. United States*, 156 U.S. 237, 243 (1895). Without seeing and hearing a witness react to the challenge of the cross-examiner, there is no confrontation, there is no "testing... and sifting of the conscience of the witness." *Id.*

The government cannot be trusted to confront its own witnesses. Adversarial "cross-examination... is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). That was a decision made by the framers of the Constitution. The Fifth Circuit's decision cannot stand side by side with the Constitution.

Certiorari should be granted to reinstate in the courts of the Fifth Circuit the principle that the government's introduction

of the plea bargain it drafted and entered into with its witness is not confrontation under the Sixth Amendment.

CONCLUSION

The Fifth Circuit has not abided by this Court's rules for analyzing claimed violations of the Confrontation Clause. As a consequence, it will not acknowledge when district courts within its purview unconstitutionally foreclose cross-examination on prototypical forms of bias, and so will not encourage its district courts to correct their erroneous views. Its opinion instead encourages them to persist in denying confrontation rights. As a further consequence, the Fifth Circuit has created conflicts with other circuits that honestly scrutinize violations of the Confrontation Clause in accordance with this Court's rules. The Fifth Circuit has also confused the government's presentation of facts that might be perceived as biasing with the

defendant's right to confront the government's version of those facts and cross-examine on their potential for distorting a witness' testimony.

Certiorari should be granted to enforce this Court's rules in Confrontation Clause cases, to resolve the conflicts among the circuits that the Fifth Circuit's violation of the rules has occasioned, and to certify that confrontation is a defendant's right that is not satisfied by the government presenting its version of a plea bargain's implications. The Court should then declare that petitioner's confrontation rights were violated. It may then remand for harmless error analysis or, instead, make the judgment itself that the confrontation violations were not harmless beyond a reasonable doubt. See *Olden v. Kentucky*, 488 U.S. 227 (1988).

Respectfully submitted,

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